85-2123

Supreme Court, U.S.
FILED
JUN 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

EMORY JAY HUCKABY,
Petitioner,

versus

THE STATE OF GEORGIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF UPSON COUNTY, GEORGIA

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June 23, 1986

3 APP

QUESTION PRESENTED FOR REVIEW

DOES PETITIONER'S CONVICTION FOR VIOLATING GEORGIA'S DRUNK DRIVING LAW VIOLATE THE DUE PROCESS GUARANTEES OF THE THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHERE THE STATUTE PROHIBITS BEING "IN ACTUAL PHYSICAL CONTROL OF ANY MOVING VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL" AND THE TRIAL COURT MADE A FINDING OF FACT "THE VEHICLE OPERATED BY [PETITIONER] WAS NOT MOVING"?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to the instant proceeding.

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NO._____

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1985

EMORY JAY HUCKABY,
Petitioner,

verus

THE STATE OF GEORGIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF UPSON COUNTY, GEORGIA

EMORY JAY HUCKABY prays that a Writ of Certiorari issue to the Superior Court of Upson County, Georgia, to review the decision of the Georgia Supreme Court dated and entered April 24, 1986, denying petitioner's Motion for Rehearing of the Georgia Supreme Court's previous decision on April 9, 1986, wherein that court

declined to grant certiorari to review the February 19, 1986, decision of the Georgia Court of Appeals denying petitioner's Application for Descretionary Appeal from the Superior Court of Upson County, Georgia. Petitioner sought review of the Superior Court's January 10th, 1986, order affirming his conviction in the Probate Court of Upson County on September 23, 1985, for the offense of Driving While Under the Influence of Alcohol in violation of Official Code of Georgia Annotated §40-6-391. Because the record remains in the Superior Court of Upson County, Georgia, it is prayed that the Writ be directed to that Court.

OPINIONS BELOW

Reproduced in the appendix to this petition are the Order of Conviction of

the Probate Court of Upson County, Georgia, dated September 30, 1985, the Order of the Superior Court of Upson County, dated January 10, 1986, affirming petitioner's conviction, the Order of the Georgia Court of Appeals dated February 19, 1986, denying petitioner's Application for Discretionary Appeal, the Order of the Georgia Court of Appeals dated March 10, 1986, denying petitioner's Motion for Rehearing, the Order of the Georgia Supreme Court dated April 9, 1986, denying petitioner's Application for Certiorari and the Order of the Georgia Supreme Court dated April 24, 1986, denying petitioner's Motion for Rehearing.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C.

§1257(3) which authorizes the grant of the Writ of Certiorari to the highest court of a State in a case where a right, privilege or immunity is specially claimed under the Constitution of the United States. In accordance with Rule 20(1) of this Court, this Application for Certiorari is filed within sixty (60) days of the entry of the Judgement of the Georgia Supreme Court on April 24, 1986, denying the Petitioner's Motion for Rehearing.

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Fourteenth Amendment, Section 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or

> immunities of citizens of the United States; nor shall any State depive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

AND

REASONS FOR GRANTING THE WRIT

EMORY JAY HUCKABY was convicted of violating Georgia's Drunk Driving Law. The trial court made a finding of fact that "[t]he vehicle operated by Defendant Emory Jay Huckaby was not moving", and fouund him guilty of "being in actual physical control of a stopped vehicle, while under the influence of alcohol". (Order of Upson County Probate Court dated September 30, 1985, Pages 1, 2).

Georgia law provides no authority to justify a conviction for drunk driving under these circumstances. It is not a

crime to be in actual physical control of a stopped, non-moving motor vehicle, and there is no statute that makes it an offense to do so in Georgia.

The statute on which the Court purportedly relied in finding Petitioner guilty is Official Code of Georgia Annotated §40-6-391(a)(1). The statute provides that "[a] person shall not drive or be in actual physical control of any moving vehicle while [u]nder the influence of alcohol". (Emphasis Supplied).

The requirement that the vehicle be "moving" was added by amendment enacted in 1974 (Ga. L. 1974, p. 671). Prior to that time it was sufficient that the defendant, while under the influence of intoxicants, did "drive, operate, or be in actual physical control of any vehicle within this state." (Ga. L. 1968, p. 445). (Emphasis Supplied).

That this amendment was designed to have a narrowing effect and to change the burden of proof to some extent has been recognized judicially. CARR v. STATE, 169 Ga. App. 679, 314 S.E.2d 694 (1986).

Petitioner now contends not merely that the interpretation given this statute by the Georgia courts in the instant matter is erroneous, but that their interpretation is so erroneous as to constitute a violation of his federally-secured right to be charged with, and convicted of conduct constituting a crime.

The right to be formally charged with a crime includes, but is not limited to, the right to have notice of the nature of the case the State intends to make against the Defendant. U.S. v. CRUIKSHANK, 92 U.S. 542 (1875); ALBRECHT v. U.S., 273 U.S. 1 (1926); HEPNER v.

U.S., 213 U.S. 103 (1908); U.S. v. PETTIT, 114 U.S. 429 (1884). Where the State contemplates the commencement of criminal action designed to obtain a conviction and then to impose punishment on an individual, it is first required to notify him of that fact in writing. BECK v. WASHINGTON, 369 U.S. 541 (1961); EX PARTE QUIVIN , 317 U.S. 1 (1942); BROWN v. MISSISSIPPI, 297 U.S. 278 (1935).

This requirement satisfies policies of Constitutional dimension. Firstly, it protects individuals from being surprised and so put at a disadvantage; secondly, it permits them to make appropriate arrangements for their own defense, including the retaining of counsel.

The necessity for prior notification derives not merely from considerations of fairness and notice but from another and juridically independant set of concerns.

Whether conduct is to be socially approved or sanctioned is not a matter for the courts but exclusively for the Legislature. And the Legislature must proscribe conduct in such a way that persons of ordinary and average intelligence would understand what is proscribed or what they are prohibited from doing, so as to permit them to conform their actions to the requirements of the law.

In WRIGHT v. GEORGIA, 373 U.S. 284 (1962), Petitioner, six young negros, were convicted of breach of the peace for peacefully playing basketball in a public park in Savannah, Georgia, on the early afternoon on Monday , January 23, 1961. Their convictions were reversed by a unanimous U.S. Supreme Court:

"Under any view of the facts alleged

> to constitute the violation it cannot be maintained that Petitioner had adequate notice that their conduct was prohibited by the breach of the peace statute. It is well established that a conviction under a criminal enactment which does not give adequate notice that the conduct charged is prohibited is violative of due process."

WRIGHT, supra, at 293.

See LANZETTA v. NEW JERSEY, 306 U.S. 451 (1938), and LAMBERT v. CALIFORNIA, 355 U.S. 225 (1957).

Thus, this Court has frequently struck down legislation on the grounds that it fails to satisfy the requirement that laws give the public fair warning of what it is forbidden for them to do. BOUIE v. CITY OF COLUMBIA, 378 U.S. 347 (1964).

Similarly, this Court has reversed convictions on the ground that the crime for which the Petitioner seeking review

was convicted was not the crime with which he was originally charged.

In COLE v. ARKANSAS, 333 U.S. 196 (1947), Petitioners were accused by information, tried and convicted only of #2 of Act #193 of the 1943 Arkansas Legislature. On appeal, to the Arkansas Supreme Court that court affirmed the convictions on the grounds that the record showed that they had violated #1 of the same Act.

On Writ of Certiorari, this Court reversed holding that it is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him under a charge that was never made. See also PRESNELL v. GEORGIA, 439 U.S. 14 (1978); JACKSON v. VIRGINIA, 443 U.S. 307, 314 (1978); GARNER v. LOUISIANA, 368 U.S. 157 (1961);

EATON v. TULSA, 415 U.S. 697 (1974).

Similarly, it violates the Due Process clause of the Fourteenth Amendment to the United States Constitution for a state court to judicially construe a penal statute in a way that retroactively gives it an expanded application. See BOUIE v. CITY OF COLUMBIA, 378 U.S. 347 (1964); DOUGLAS v. BUDER, 412 U.S. 430 (1973); MARKS v. U.S., 430 U.S. 188 (1976).

The lesson to be derived from a review of the decisions of this Court is that it is a violation of the Due Process Clause of the Fourteenth Amendment for the State to change the rules by which a criminal trial is to be conducted once the trial has commenced.

Petitioner here was neither charged with, given notice of, nor afforded the oppportunity to defend against a theory

of criminal liability on his part based on a reading of the governing statute that would authorize a conviction for being in actual physical control not only of a vehicle that was not in motion but which the court found as a fact was stopped.

To allow the State of Georgia to obtain a conviction in this manner, by these means and on the basis of a retroactive interpretation of the Statute, unsupported by the Legislative history or plain meaning of the Statute, would be to condone an agregious violation of one of the most elementary principles of Due Process: that Defendant be tried for violation of a penal statute, the meaning of which has been established prior to commencement of proceedings against him.

As defined by the Georgia

Legislature, it is a crime for a person to drive or to be in actual physical control of any moving vehicle while under the influence of alcohol.

The requirement that the vehicle be in motion is therefore a crucial element of the offense and the burden of proving it remains on the State throughout the trial. MULLANEY v. WILBUR, 421 U.S. 684 (1975); PATTERSON v. NEW YORK, 432 U.S. 197 (1977).

The finding of the trial court here, to the effect that the vehicle was not moving demonstrates that the State failed to satisfy its burden as to this critical question of fact. There was a total want of evidence to support the State's case and, accordingly, and as a matter or Constitutional law, the verdict should have been entered for the Petitioner. JACKSON v. VIRGINIA, 443 U.S. 307, 314

(1978); VACHON v. NEW HAMPSHIRE, 414 U.S. 478 (1973); JOHNSON v. FLORIDA, 391 U.S. 596 (1968); GREGORY v. CHICAGO, 394 U.S. 111 (1969); GARNER v. LOUISIANA, 368 U.S. 157 (1961); THOMPSON v. LOUISVILLE, 362 U.S. 199 (1960).

The burden of proof in a criminal case rests on the State. The State may not, consistent with the requirement of Due Process and Fair Trial, obtain a conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime...charged. IN RE WINSHIP, 397 U.S. 358 (1970). In this case the finding of the Court was adverse to the theory of the State, which was, on ordinary principles, not entitled to obtain a conviction.

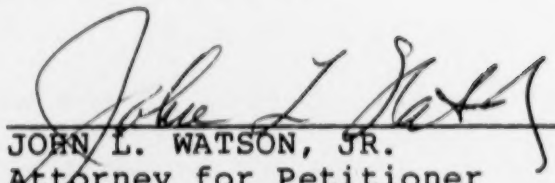
For this conviction to stand would be to sustain a conviction obtained by evidence falling well short of the

Constituitional standard, and would violate well-established principles of Due Process and Fair Trial.

CONCLUSION

For the foregoing reasons petitioner respectfully submits the Georgia Supreme Court in refusing to review the decision of the Georgia Court of Appeals which refused to review the Upson County Superior Court's affirmance of the decision of the Probate Court of Upson County has decided a federal question in a way in conflict with applicable decisions of this Court defining due process requirements in State criminal prosecutions. The writ of Certiorari should issue to the Upson County, Georgia, Superior Court wherein the record is located and the case set for full briefing and oral argument.

Respectfully submitted,



JOHN L. WATSON, JR.
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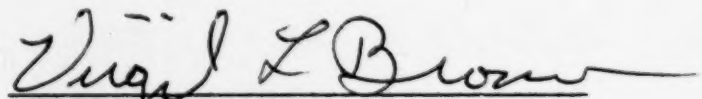

VIRGIL L. BROWN
Of Counsel

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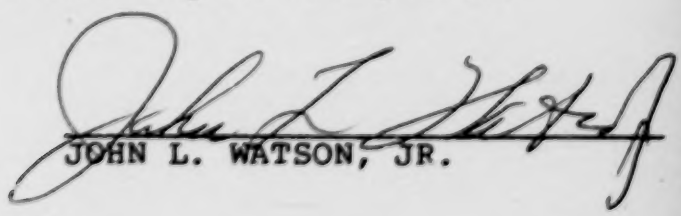
CERTIFICATE OF SERVICE

This is to certify that I have this date served one copy of the within and foregoing Petition for Writ of Certiorari upon the Georgia Attorney General, Georgia Department of Law, Room 132, Judicial Building, 40 Capital Square, S.W., Atlanta, Georgia 30334 and upon the District Attorney for the Griffin Judicial Circuit, 2nd Floor, Upson County Courthouse Annex, Thomaston, Georgia 30286 by depositing the same in the United States Mail in properly addressed envelopes with adequate postage thereon. I further certify that all parties required to be served have been served.

This 23rd day of June, 1986.



JOHN L. WATSON, JR.

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IN THE PROBATE COURT OF UPSON COUNTY, GA

Decided: September 30, 1985

104244. THE STATE v. HUCKABY

The Defendant in the above styled case filed pre-trial motions on September 20, 1985, was arrained [sic] and plead not guilty on September 23, 1985. Defendant waived jury trial and was tried before this Court on September 23, 1985.

Defendant, by Counsel, made a DEMAND FOR COPY OF ACCUSATION AND LIST OF WITNESSES which was complied with.

Defendant, by Counsel, made a DEMAND FOR COPY OF DEFENDANT'S STATEMENTS AND SCIENTIFIC REPORTS which was not complied with. Arresting Officer testified he had said demand for three days prior to trial.

Defendant, by Counsel, made a MOTION TO QUASH ACCUSATIONS which was denied.

Defendant, by Counsel, made a MOTION

TO SUPPRESS AND MOTION IN LIMINE which was denied.

Sgt. Hoyal testified over Defense Counsel's objections that Defendant admitted driving vehicle earlier, but he could not swear the vehicle was moving when he arrested Defendant. The basis of Defense Counsel's objections was that the information was hearsay as well as his DEMAND FOR COPY OF DEFENDANT'S STATEMENTS AND SCIENTIFIC REPORTS filed prior to arraignment on September 20, 1985 had not been complied with.

There was no evidence presented as to whether the Defendant was a less safe driver.

There was no evidence presented as to whether intoximeter 3000 or the operator of said intoximeter was certified to run intoximeter test on Defendant.

FINDING OF FACT

Upon evidence presented the Court makes the following finding of fact:

The vehicle operated by Defendant Emory Jay Huckaby was not moving.

VERDICT AND SENTENCE

Defendant Emory Jay Huckaby is hereby found guilty of being in actual physical control of a stopped vehicle while under the influence of alcohol and sentenced to pay a fine of $1,100.00 or serve 12 months.

This 30th day of September, 1985.

/s/VIRGIL L. HAMBY

Judge, Probate Court

* *

IN THE SUPERIOR COURT OF UPSON COUNTY, GA

Decided: January 10, 1986

MD-6236. HUCKABY v. THE STATE and PROBATE COURT OF UPSON COUNTY, GA

Petition for Certiorari to the

Superior Court of Upson County in Case No. 104244 in the Probate Court of Upson County, Georgia, having been filed and considered.

It is the Order of this Court that the conviction of the Appellant in the Probate Court of Upson County is hereby affirmed in each and every instance.

This 10th day of January, 1986.

/s/BEN J. MILLER

Judge, Superior Court

* *

COURT OF APPEALS OF THE STATE OF GEORGIA

February 19, 1986

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

1468. HUCKABY v. THE STATE.

Upon consideration of the Application for a Discretionary Appeal, it is ordered that it be hereby

dismissed.

COURT OF APPEALS OF THE STATE OF GEORGIA, Clerk's Office, Atlanta, February 19, 1986.

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ALTON HAWK

Clerk

* *

COURT OF APPEALS OF THE STATE OF GEORGIA

March 10, 1986

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

1468. HUCKABY v. THE STATE.

Upon consideration of the motion for a rehearing filed in this case, it is

ordered that it be hereby denied.

COURT OF APPEALS OF THE STATE OF GEORGIA, Clerk's Office, Atlanta, March 10, 1986.

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ALTON HAWK

Clerk

* *

IN THE SUPREME COURT OF GEORGIA

April 9, 1986

Case No. 43339. HUCKABY v. THE STATE.

The Supreme Court today denied the writ of certiorari in this case.

Marshall, C.J., Clarke, P.J., Smith, Gregory, Weltner and Bell, JJ, concur.

Very truly yours,

JOLINE B. WILLIAMS, Clerk

* *

IN THE SUPREME COURT OF GEORGIA

Decided: April 24, 1986

The motion for a rehearing was denied today:

Case No. 43339. HUCKABY v. THE STATE.

Yours very truly,

MRS. JOLINE B. WILLIAMS, Clerk

Supreme Court, U.S.
FILED
OCT 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2123

In The
Supreme Court of the United States
October Term, 1985

EMORY JAY HUCKABY,
Petitioner,

vs.

THE STATE OF GEORGIA,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF UPSON COUNTY, GEORGIA

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October 30, 1986

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QUESTION PRESENTED FOR REVIEW

DOES THE CONCLUSION OF THE TRIAL COURT THAT PETITIONER WAS "IN ACTUAL PHYSICAL CONTROL OF A STOPPED VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL" AND CONSEQUENT ENTRY OF JUDGMENT AGAINST HIM VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to the instant proceeding.

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No. 85-2123

In The

Supreme Court of the United States

October Term, 1985

EMORY JAY HUCKABY,

Petitioner,

vs.

THE STATE OF GEORGIA,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF UPSON COUNTY, GEORGIA

I. STATEMENT OF JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3).

II. CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision which Petitioner contends is applicable to the instant action is the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

III. REASONS WHY THE WRIT SHOULD NOT BE GRANTED

A. Course of Proceedings Below

The Petitioner in this case, Emory Jay Huckaby, was arrested and charged with the offense of driving under the influence by one Sergeant Hoyal. The citation was returned to the Probate Court of Upson County, Georgia, and was scheduled for trial. Petitioner was arraigned and entered a plea of not guilty to the offense on September 23, 1985, waived jury trial, and was tried by the Court on that same day. On September 30, 1985, the Honorable Virgil L. Hamby, Judge of the Probate Court of Upson County, found Petitioner guilty as charged and sentenced him to twelve months imprisonment or payment of a fine of $1,100.00.

Petitioner filed a Petition for Writ of Certiorari to the Superior Court of Upson County, Georgia. By Order of January 10, 1986, the Superior Court affirmed the decision of the trial court. Petitioner applied for discretionary appeal in the Georgia Court of Appeals, and the application was dismissed February 19, 1986. A Motion for Rehearing of that Order was denied March 10, 1986. Petitioner then filed a Petition for Writ of Certiorari to the Supreme Court of Georgia, which denied the writ on April 9, 1986, and denied a Motion for Rehearing on April 24, 1986.

B. Argument and Citation of Authority

Petitioner was charged with a violation of O.C.G.A. § 40-6-391, the Georgia statute which prohibits driving under the influence. Specifically, that Code Section provides that:

(a) A person shall not drive or be in actual physical control of any moving vehicle while:

(1) under the influence of alcohol.

At the conclusion of Petitioner's bench trial in the Probate Court of Upson County, Petitioner was found to have been "in actual physical control of a stopped vehicle while under the influence of alcohol." Petitioner contends that operating a stopped vehicle is not a criminal violation and that therefore his conviction violates the Due Process Clause of the United States Constitution. Respondent submits that no violation of Petitioner's constitutional rights occurred below.

It is true that the statute in question requires that the vehicle driven by the defendant must have been "moving." *Carr v. State,* 169 Ga. App. 679 (1984). However, under Georgia law, the fact that a vehicle was moving may be inferred by the trier of fact. *Fuller v. State,* 166 Ga. App. 734 (1983). In the instant case, the trial court found, in its verdict, that Petitioner had been "in actual physical control of a *stopped* vehicle . . . ." (Emphasis added).

Petitioner seeks to extrapolate from the court's verdict a conclusion that Petitioner's vehicle had *never* been moving, and therefore his conduct was not of a criminal nature. Respondent submits that this is not a correct reading of the trial court's verdict. The trial court rendered a verdict that Petitioner had operated a "stopped" automobile. This conclusion does not mean that Petitioner's vehicle had not previously been moving. The word "stopped" is defined in Webster's New Collegiate Dictionary as meaning to discontinue, to halt, to cease

activity or operation, or a cessation. Webster's New Collegiate Dictionary, p. 1146 (1977).

Thus, in its ordinary meaning and usage, use of the word "stopped" by the trial court clearly implies that the vehicle had previously been moving. Indeed, the trial court's Order bears out such a conclusion. The court specifically noted that the arresting officer testified that Petitioner had "admitted driving [his] vehicle earlier, but [the arresting officer] could not swear the vehicle was moving when he arrested [Petitioner]." Appendix at 2a.

It is submitted by Respondent that the trial court's verdict that Petitioner had been convicted of "being in actual physical control of a stopped vehicle while under the influence of alcohol . . ." was simply a recognition by the trial court that Petitioner's vehicle had stopped at the time he was observed and arrested by the arresting officer and not a conclusion by the trial court that Petitioner's vehicle had not previously been moving. Under Georgia law, even if no one observed the automobile move, so long as there is some evidence of movement, this is sufficient. *Russell v. State,* 174 Ga. App. 436, 437 (1985). In this case, there was testimony that Petitioner had admitted driving the vehicle prior to observation by the arresting officer. Thus, it is submitted that there was sufficient evidence of movement of the vehicle before the trier of fact to support the conviction.

Contrary to Petitioner's assertions, O.C.G.A. § 40-6-391 has not been judicially construed so as to retroactively give it an expanded application. The trial court's finding that Petitioner's vehicle was stopped simply reflects the testimony before the court that Petitioner's

vehicle was stopped when observed by the arresting officer. This is not the same as a finding by the trial court that Petitioner's vehicle had never been moving. Petitioner was tried and convicted of being in actual physical control of a moving vehicle while under the influence of alcohol. While the trial court's verdict, concluding that Petitioner's vehicle was "stopped," may have been less than artfully worded, Respondent submits that that did not violate Petitioner's constitutional rights, and accordingly urges that the Petition for Writ of Certiorari should be denied.

CONCLUSION

For the above and foregoing reasons, it is respectfully urged that Petitioner's due process rights in State criminal prosecutions have not been violated, and that the Petition for Writ of Certiorari should accordingly be denied.

Respectfully submitted,

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